Supreme Court, U.S.
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No. 03 343

In The
Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in extending this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to create a rigid rule barring any United States court from ever, in any circumstance, considering a claim made by a foreign national held in U.S. custody outside U.S. sovereign territory?

2. Did the Court of Appeals err in holding categorically that the Constitution gives "no constitutional rights, under the due process clause or otherwise," to foreign nationals who are subjected to injurious action by the U.S. Government unless they have set foot physically within territory over which the United States has technical sovereignty (as distinguished from exclusive jurisdiction and control)?

3. Consistently with the Constitution, federal statutes, regulations and treaties, and international law, may U.S. officials imprison citizens of friendly nations indefinitely without charges, without access to their families or counsel, and without even a hearing to determine whether any basis exists for their detentions, after transporting them forcibly thousands of miles to an area under the exclusive jurisdiction and control of the United States?

4. May U.S. government officials evade judicial examination of their actions in detaining people *incommunicado,* and escape the reach of the Constitution and of federal law, simply by electing to confine their prisoners in an area technically outside U.S. sovereign territory although within its exclusive jurisdiction and control?

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

The following Kuwaiti nationals who are imprisoned at Guantanamo Bay Naval Base appeared below as plaintiffs: Fawzi Khalid Abdullah Fahad Al Odah, Omar Rajab Amin, Nasser Nijer Naser Al Mutairi, Khalid Abdullah Mishal Al Mutairi, Abdullah Kamal Abdullah Kamal Al Kandari, Abdulaziz Sayer Owain Al Shammari, Abdullah Saleh Ali Al Ajmi, Mohammed Funaitel Al Dihani, Fayiz Mohammed Ahmed Al Kandari, Fwad Mahmoud Al Rabiah, Adil Zamil Abdull Mohssin Al Zamil, and Saad Madai Saad Al Azmi. The following additional Kuwaiti nationals, who are family members of the Kuwaiti nationals listed above, also appeared below as plaintiffs: Khaled A.F. Al Odah, father of plaintiff Fawzi Khalid Abdullah Fahad Al Odah; Mohammad R.M.R. Ameen, brother of plaintiff Omar Rajab Amin; Nayef N.N.B.J. Al Mutairi, brother of plaintiff Nasser Nijer Naser Al Mutairi; Meshal A.M.TH Al Mutairi, brother of plaintiff Khalid Abdullah Mishal Al Mutairi; Mansour K.A. Kamel, brother of plaintiff Abdullah Kamal Abdullah Kamal Al Kandari; Sayer O.Z. Al Shammari, father of plaintiff Abdulaziz Sayer Owain Al Shammari; Mesfer Saleh Ali Al Ajmi, brother of Abdullah Saleh Ali Al Ajmi; Mubarak F.S.M. Al Daihani, brother of plaintiff Mohammed Funaitel Al Dihani; Mohammad A.J.M.H. Al Kandari, father of plaintiff Fayiz Mohammed Ahmed Al Kandari; Monzer M.H.A. Al Rabieah, brother of plaintiff Fwad Mahmoud Al Rabiah; Walid Z.A. Al Zamel, brother of plaintiff Adil Zamil Abdull Mohssin Al Zamil; and Hamad Madai Saad, brother of plaintiff Saad Madai Saad Al-Azmi (collectively the "Family Members"). The following appeared below as defendants: the United States of America; George W. Bush,

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW – Continued

President of the United States; Donald H. Rumsfeld, Secretary of Defense; General Richard B. Myers, Chairman of the Joint Chiefs of Staff; Brigadier General Rick Baccus, Commander of Joint Task Force-160, and Colonel Terry Carrico, Commandant of Camp X-Ray/ Camp Delta.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Appendix ("App.") 33-69) is reported at 214 F. Supp. 2d 55 (D.D.C. 2002). The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1-32) is reported at 321 F.3d 1134 (D.C. Cir. 2003).

BASIS FOR JURISDICTION

The judgment of the Court of Appeals for the D.C. Circuit was entered on March 11, 2003. A petition for rehearing was denied on June 2, 2003 (App. 72-74). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS

United States Constitution, Amendment V; 5 U.S.C. §§ 555, 702, 706; 28 U.S.C. § 2241(c)(3); U.S. Army Regulation 190-8, Washington, D.C. (1 October 1997); U.S. Department of the Army Field Manual, FM 3-19.40 (1 August 2001); Geneva Convention III, Aug. 1949, art. 5, 75 U.N.T.S. 135; and International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 are reprinted at App. 75-86.

STATEMENT OF THE CASE

(A) Statement of Facts

Petitioners are twelve Kuwaiti nationals (the "Kuwaiti Detainees") imprisoned for over a year and a half at the Guantanamo Bay Naval Base, ("Guantanamo"), and family members who speak on their behalf. The Court of Appeals below affirmed the district court's dismissal of their amended complaint alleging that the refusal of respondents (the "government") (i) to inform them of the charges, if any, against them, (ii) to allow them to meet

with their families and with counsel, and (iii) most importantly, to grant them access to any impartial tribunal, military or civilian, to review the basis for their detentions violates the Constitution, federal law and regulations, and treaties of the United States.

1. The Terrorist Attacks

On September 11, 2001, terrorists high-jacked four airliners flying three of them into the twin towers of the World Trade Center in New York City and the Pentagon, killing thousands of innocent people. In the wake of the attack, which was executed by the terrorist organization known as al Qaida, President Bush launched a military campaign against al Qaida and the Taliban Regime that supported al Qaida.

On November 13, 2001, the President issued a Military Order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in The War Against Terrorism" (the "Military Order"). 66 Fed. Reg. 57, 833-36. (Nov. 16, 2001). Section 1(e) of the Military Order states that, "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained. . . . " Section 2 provides that any non-citizen of the United States may be detained if the President determines "in writing" that "there is reason to believe" he or she "is or was a member of the organization known as al Qaida" or has engaged in or supported terrorism or other acts aimed at injuring the United States.

2. The Kuwaiti Detainees

The complaint asserts that the Kuwaiti Detainees were in Pakistan or Afghanistan as charitable volunteers to provide humanitarian aid to the people of those countries. None of the Kuwaiti Detainees is or ever has been a member or supporter of al Qaida or the Taliban, or of any terrorist organization, or has ever engaged in or supported

any terrorist or hostile act against the United States. After September 11, local villagers seized the Kuwaiti Detainees, who were then turned over to United States authorities in exchange for financial bounties.[1]

Those assertions are independently supported. U.S. authorities had distributed leaflets promising: "millions of dollars for helping . . . catch Al Qaida and Taliban murderers . . . enough money to take care of your family, your village, your tribe for the rest of your life." (App. 91). Defendants and their subordinates have acknowledged that some of the Guantanamo detainees were probably "victims of circumstance" – in the wrong place at the wrong time – and "probably innocent." (App. 94). *See also* R. Gutman, C. Dickey and S. Yousafzi, *Guantanamo Justice*? Newsweek, July 8, 2002, at 34-37 (an investigative report about five of the Kuwaiti detainees who "may be little more than volunteers for their society's version of faith-based charities" who "wanted to help Afghans suffering from drought and famine and then from the war . . . but discovered, once the conflict began, that they could not get out. And as the war turned against the Taliban," they were "sold" into captivity); G. Miller, *Many Held at Guantanamo Not Likely Terrorists*, Los Angeles Times, Dec. 22, 2002, at 1-1 ("The United States is holding dozens of prisoners at Guantanamo Bay who have no meaningful connection to Al Queda or the Taliban, and were sent to the maximum-security facility over the objections of intelligence officers in Afghanistan who had recommended them for release, according to military sources with direct knowledge of the matter."); S. Taylor, *Guantanamo: A Betrayal of What America Stands For,* National Journal, July 26, 2003, at 2399 ("[T]here are reasons to suspect that a substantial percentage of the 660 [prisoners at Guantanamo] were Arab students and charity workers,

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[1] For purposes of ruling on the government's motion to dismiss, the district court accepted as true petitioners' allegations in the amended complaint. (App. 39).

other civilian non-combatants, or helpless Taliban conscripts who were simply in the wrong place at the wrong time.").

The President has made no determination under section 2 of the Military Order that there is reason to believe that any of the Kuwaiti Detainees is a member of al Qaida or the Taliban or has engaged in or supported terrorism or other acts aimed at injuring the United States. Nevertheless, beginning on January 11, 2002, the Kuwaiti Detainees were forcibly taken and transported thousands of miles by U.S. authorities to Guantanamo. They have been imprisoned there ever since, in small cells and in virtual isolation. They have been subject to constant interrogation.[2] They are apparently allowed out of their cells only two or three times a week in chains for fifteen minutes at a time to shower and exercise. None of the Kuwaiti Detainees has been informed of any charges against him, permitted to meet with his family or counsel, or allowed access to any impartial tribunal, military or civilian, to review whether any basis exists for his detention.

3. Guantanamo

In 1903, in withdrawing its forces after the Spanish-American War, the United States entered into a lease with the newly formed Republic of Cuba for the territory that now forms Guantanamo. The lease continues in perpetuity unless both parties agree to terminate it. The United States has indicated its intention to continue the lease indefinitely. The lease provides:

[2] According to a statement made by Secretary of Defense Donald Rumsfeld on February 27, 2002, over 18 months ago, the United States at that point had finished the process of interrogating the detainees for intelligence purposes and had begun interrogating them for criminal prosecution. (App. 97).

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over [the military base at Guantanamo Bay], on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire . . . for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain. . . .[3]

Guantanamo exceeds 45 square miles. "The base is entirely self-sufficient, with its own water plant, schools, transportation, and entertainment facilities."[4] The U.S. courts exercise criminal jurisdiction over both U.S. citizens and foreign nationals at Guantanamo.[5] On its official "web" site, the United States Navy has described Guantanamo as "a Naval reservation, which, for all practical purposes, is American territory. Under the [lease] agreements, the United States has for approximately [one hundred] years exercised the essential elements of sovereignty over this territory, without actually owning it."[6]

[3] Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. 418.

[4] G. L. Neuman, *Anomalous Zones*, 48 Stan. L. Rev. 1197 n.5 (1996).

[5] *See United States v. Lee*, 906 F.2d 117 (4th Cir. 1990) (Jamaican National); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (U.S. citizen working at Guantanamo).

[6] *See The History of Guantanamo Bay: An Online Edition* (1964), available at http://www.nsgtmo.navy.mil/history.htm ("U.S. Navy Website").

(B) Proceedings in the District Court

The Kuwaiti Detainees sought modest relief: that they be informed of the charges, if any, against them; that they be allowed to meet with their families and counsel; and that they be afforded access to an impartial tribunal to review whether any basis exists for their continued detentions. They asked for those rights subject to any restrictions that might reasonably be necessary to protect national security. They alleged that the denial of these rights violates the Constitution, international law and treaties of the United States, and is arbitrary, capricious, and contrary to federal law and regulations under the Administrative Procedure Act ("APA"). They sued under 28 U.S.C. §§ 1331, 1350 and 1361.

For jurisdictional purposes, the district court consolidated this case with habeas corpus petitions filed for British and Australian prisoners at Guantanamo. The government moved to dismiss for lack of jurisdiction. The district court dismissed with prejudice. (App. 70-71).

(C) The D.C. Circuit Opinion

On March 11, 2003, the D.C. Circuit affirmed the district court's decision, largely on the basis of this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Eisentrager*, this Court held that 21 German "enemy aliens" who had been represented by counsel and were charged, tried and convicted of war crimes by a military tribunal and imprisoned in Germany were not entitled to challenge their convictions by habeas proceedings in the civilian courts. The D.C. Circuit assumed that the Kuwaiti Detainees are not "enemy aliens" and have not engaged in hostilities against the United States (App. 11), but it read *Eisentrager* to mean that "constitutional rights . . . are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens." (App. 13). As a result, the D.C. Circuit concluded that "no court in this country has jurisdiction to grant habeas relief" to the detainees. (App. 14).

Further, the D.C. Circuit held that, even if the Kuwaiti Detainees' claims "do not sound in habeas," the "courts are not open to them." (App. 20-21). It read *Eisentrager* as establishing broadly that "'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign'" (App. 20) and as entailing the still broader rule that foreign nationals "without property or presence in this . . . [sovereign territory have] no constitutional rights, under the due process clause or otherwise." (App. 14). The court rejected the argument that, even if *Eisentrager* supported these sweeping propositions, they could not be extended to foreign nationals held at Guantanamo because the United States exercises complete control and jurisdiction there. (App. 18). The court held that Cuba's technical "sovereignty" over Guantanamo, rather than United States jurisdiction and control, was determinative. (App. 17-19).

REASONS FOR ALLOWANCE OF THE WRIT

There is no doubt that the manner in which the government is holding the Kuwaiti Detainees – incarcerating them for more than a year and a half without charge or access to their families or counsel or to any impartial tribunal to determine whether there is a basis for their detention – is radically at odds with any constitutional regimen of due process or the rule of law. Moreover, it is in direct violation of the government's own regulations.[7]

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[7] *See Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, U.S. Army Regulation 190-8, Chapter 1-5, para. a, Applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps, Washington, D.C. (1 October 1997) ("All persons taken into custody by U.S. forces will be provided with the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War ("GPW") until some legal status is determined by competent authority."); *id.* at 1-6 para. b ("a competent tribunal shall determine the status of any person . . . concerning whom any doubt . . . exists"); *id.* at 1-6 para. g ("Persons who have been determined by a

(Continued on following page)

Nevertheless, the D.C. Circuit ruled that the Kuwaiti Detainees have no right to complain to our courts because they are foreigners whom the government has chosen to jail outside U.S. sovereign territory.

It has been two years since terrorists savagely attacked our nation. That attack exposed our vulnerability to a new type of enemy, one more amorphous than those we have faced in the past. All Americans should support whatever actions are necessary to protect our national security. As with the threats we have faced in the past, however, this new threat requires us to draw a balance between security and the nation's founding principles of constitutional order, fundamental fairness and liberty. The essential question raised by this case is whether the courts have any role to play in striking that balance – or, more precisely, in ensuring that a balance is struck. According to the government, the answer to that question is "no" – at least with respect to foreign nationals it chooses to hold outside U.S. sovereign territory. The D.C. Circuit agreed.

The D.C. Circuit's decision raises questions that go to the heart of our constitutional separation of powers, the proper role of the executive and judicial branches in times of crisis, and the obligations we owe to citizens of allied nations. Those questions can be decided only by this Court. They should be decided now, for the war on terrorism can be expected to last a very long time, and the

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competent tribunal not to be entitled to prisoner of war status may not be . . . imprisoned or otherwise penalized, without further proceedings to determine what acts they have committed and what penalty should be imposed."); *id.* at 3-8, para. d ("Accused persons will be notified promptly of the charges in writing. . . . These persons will be tried as soon as possible."); U.S. Department of the Army Field Manual, FM 3-19.40, 1-10 (1 August 2001) ("A person in the custody of US armed forces . . . is treated as an EPW [enemy prisoner of war] until a legal status is ascertained by competent authority."); *id.* at 4-33 ("A tribunal is held according to Article 5, GPW. It determines the status of an individual who does not appear to be entitled to EPW status. . . . "). (App. 80-83).

standards set now will prescribe the nation's behavior for years to come.

1. The Decision Grants the Executive Unprecedented Authority to Define Federal Court Jurisdiction.

It has been established for 200 years that the courts are the guardians of this country's fundamental legal principles, empowered to test the legality of actions taken by the coordinate branches of government. The courts, of course, may determine that certain acts of Congress or the executive are non-justiciable and beyond review. But the authority to determine the boundaries of judicial jurisdiction rests with the judiciary itself. It is for the courts and not the executive to determine whether executive action is subject to judicial review.

The D.C. Circuit decision would change that. By establishing a mechanical rule that makes court jurisdiction turn solely on where the prisoners are held, that decision would enable the executive to manipulate the boundaries of judicial authority so as to avoid court review of governmental actions. Executive branch officials would have the power to divest the courts of jurisdiction simply by choosing to hold aliens outside U.S. sovereign territory.

That appears to be have been the purpose here. The government loaded the detainees on planes in Pakistan and Afghanistan and flew them halfway around the world. Instead of landing the planes at an available facility in the United States, it chose to stop 90 miles short of our borders. By making that choice, it says it has divested the courts of jurisdiction.

But it is not for the executive branch to define the jurisdiction of the federal courts. The protections our system provides against unwarranted governmental intrusion into personal liberty are found not only in the guarantees of the Bill of Rights. The most basic protection arises from the separation of powers among the branches of our government and from the principle of legality – the rule of law – founded in the Common Law. The executive

may never be above the law. A purported executive power to detain people indefinitely and without any legal process deprives the judiciary of its essential function as a check on the power of the executive. To allow the executive untrammeled power over the liberty of persons violates the very essence of the separation of powers that the Constitution's framers implemented to guard against tyranny.

2. The Decision Relieves the Government of Any Obligation to Justify the Necessity of Its Actions.

No one disputes that the government should do everything necessary to protect our nation from terrorism. But it is equally beyond dispute that we cannot allow the threat of terrorism to compromise our fundamental principles of justice, fairness, and government accountability to the rule of law unless this is necessary. A judgment must be made of what is necessary.

That is not a judgment the executive alone should make. The executive's focus is not on protecting personal liberty or preserving our time-honored safeguards against governmental excesses, but on security and appearing to do whatever is possible to increase public safety. In focusing on those objectives, the government can be expected to push its powers to the limit, and beyond. Someone impartial must have authority to examine the executive's actions. That is the traditional role of the judiciary.

Absent federal court jurisdiction, the executive has no need to demonstrate the necessity of its actions. And, indeed, it has made no attempt to do so in this case. It has given no reason why it would threaten our security to allow the detainees to speak with their families, to have access to counsel, or to have some impartial tribunal, military or civilian, review whether there is a basis for their continued detentions. Rather, the government has taken the position that it has no need to explain – because the courts simply have no jurisdiction to examine its actions.

But the courts must have authority to examine those actions. They must have authority to ask of the executive: "Why are these restrictions necessary?" The courts should give deference to the executive's judgment of what is necessary, particularly in times of war or threat to the nation. But they must have the authority to defer, and there must be some showing – some explanation to which deference is due – that the executive's actions are in fact necessary.

It is always more convenient not to explain. But principles of justice and legal order cannot be overridden without a showing of necessity. And the executive cannot evade its duty to make such a showing by spiriting people to prison camps set up outside the zone of technical sovereignty. Court review does not threaten our national security. It does not exalt liberty over security. It simply ensures that a balance will be drawn.

3. The Decision Creates a Rigid Rule that Deprives the Courts of the Ability to Examine the Executive's Actions at Any Time and Under Any Circumstances.

The D.C. Circuit's decision authorizes the government to deprive foreign nationals of all legal rights – and the judiciary of jurisdiction to consider those rights – simply by opting to jail them outside the United States. It does not matter whether the legal rights asserted arise under the Constitution, treaties of the United States, federal common law or the government's own regulations. So long as those jailed are foreigners and the government chooses to jail them outside the area of technical U.S. sovereignty, judicial review is barred under any circumstances.

The D.C Circuit's decision does not depend on a state of war or whether the foreigners detained are enemy combatants. It would apply in times of peace as well as war. It would as clearly authorize executive officials to seize a Canadian off the streets of Toronto in time of peace as an Arab off the streets of Islamabad in time of war. In either case, the officials would not need to explain to any

court why their actions are required to further the nation's security interests, or attempt to reconcile those interests with the commands of legality, fairness, or due process. The government's conduct would be insulated from judicial examination in either case – so long as its prisoners are foreigners jailed outside the United States.

That would be so no matter how long the prisoners are held – for a few months, or a few years, or forever. Under the D.C. Circuit's decision, foreign citizens jailed by the United States outside its sovereign territory without charge, trial or conviction may *never* petition the U.S. courts for relief. Indeed, the Secretary of Defense has said that, even if those detained at Guantanamo are charged, tried and acquitted by a military tribunal, the United States may continue to imprison them. (App. 98-100). Even then, there could be no judicial review.

U.S. officials could also do whatever they want to foreigners jailed outside the United States, denying them not only the most basic procedural protections, but substantive protections as well, including guarantees against discrimination, torture and summary execution. The government could decide to hold only Africans or Irish or Italians or Arabs, or only women or homosexuals, or to deprive them of sleep or food or shelter. No claim could be made. Indeed, the courts would even be barred from considering a claim by detainees that U.S. government officials had suddenly ordered them to be placed before a firing squad and shot, without charge, trial or conviction of any crime.

The question is not whether the government presently means to do any of these terrible things. It is whether the courts will ever have the authority to step in, even when the government appears clearly to have crossed the line of human decency.[8]

[8] In fact, it is not known exactly how the prisoners at Guantanamo are being treated. It is clear that they are not being treated in accordance

(Continued on following page)

4. The Decision Wrongly Permits Petitioners To Be Imprisoned Indefinitely Without Charges and Without Even a Hearing.

(a) The Decision Turns Petitioners Out of Court Although They Seek Only the Basic Procedural Protections Required by U.S. Law.

Petitioners do not contend that the government lacked power to detain them, nor do they ask for their immediate release. They ask only that, subject to reasonable security measures, they be allowed to meet with their families, consult with counsel, and obtain the judgment of some impartial tribunal as to whether there is cause to detain them. In short, they ask only that the court ensure that adequate procedures are in place so that their detentions are not arbitrary.

The government must clearly have the power to detain and incarcerate foreign nationals who pose a danger to the nation. But there must be some legal process for distinguishing those who are dangerous from those who have been swept up without basis. The Geneva Conventions provide such a procedure, requiring that a Competent Tribunal be convened to review and determine the status of each detainee taken into custody in connection with an armed conflict as to whom there is any doubt.[9] The government's own regulations incorporate those

with the Geneva Conventions. *See* T. Conover, *In the Land of Guantanamo*, The New York Times Magazine, June 29, 2003, at 40; R. Gutman, *A World With Its Own Rules*, Newsweek International, June 30, 2002. Press reports also suggest that the U.S. may be engaging in conduct that violates international rules against cruel, inhuman and degrading treatment. *See* C. Gall and N. A. Lewis, *Tales of Despair from Guantanamo*, New York Times, June 17, 2003, at A-1; *Suicide Attempts Now at 32 for Detainees in Guantanamo*, The Associated Press, August 26, 2003.

[9] Geneva Convention III, Article 5. (App. 84).

requirements and expressly require that such hearings be held.[10]

Those regulations were specifically designed to deal with the capture and detention of aliens abroad. By their terms, they apply to anyone held in U.S. custody, whether or not in U.S. sovereign territory. Yet they have not been followed. Nor has the requirement of the President's Military Order that there must be a written determination of "reason to believe" that a detained foreign national is a member or supporter of al Qaida or of other terrorist organizations.

The process required by the government's regulations for distinguishing between those who are hostile and those who are not is particularly important in this new kind of war – a war on terrorism – precisely because the enemy is not easily identified. He may be dressed like a civilian and may be a citizen of a friendly nation. He may be taken into custody during the affairs of daily life, far from the scene of any visible battle; and this may happen today or next year or ten years hence – for no public ceremonies are conducted to mark the end of a war on terrorism. He may be apprehended and turned over to U.S. authorities by persons having no better reason to do so than opportunism and the hope of bounties. Clearly, however, not all people dressed like civilians are enemies; most citizens of friendly nations are not hostile; and the judgment and discernment of bounty hunters are no satisfactory litmus for distinguishing friend from foe. The danger of mistake is therefore greater, more continuous, more open-ended – as is the need for a process to distinguish and prevent the prolonged and unjustified detention of the innocent.

Petitioners do not contend that an Article III court must itself conduct that process and review the basis for each individual detention. Rather, they contend only that

[10] *See* n.7, *supra*.

some legal process must apply and that the federal courts must have jurisdiction to ensure that one does.

The government apparently recognizes that, if it lodges criminal charges against a detainee at Guantanamo, it must provide at least certain of the basic procedural safeguards ordinarily assured to persons prosecuted for crime. It seems to believe, however, that so long as it does not charge them, it may hold them indefinitely, imprisoning them without any rights whatsoever. But the courts have long rejected the concept that the government may avoid providing basic procedural protections simply by not lodging a charge.[11] The precondition to any extended incarceration must be some impartial examination of the facts and circumstances to determine if a basis exists to deprive a person of liberty. That safeguard, essential to the framers of our Constitution, is well recognized under the Common Law.[12]

As noted, the government's own regulations establish such a procedure for people detained in connection with a

[11] *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 117-18 (1975); *Jackson v. Indiana*, 406 U.S. 715, 737-739 (1972); *Addington v. Texas*, 441 U.S. 418, 425-427 (1979); *Zavydas v. Davis*, 533 U.S. 678, 690 (2001).

[12] *See, e.g., Ex parte Bollman*, 8 U.S. (1 Cranch) 75 (1807). As Alexander Hamilton stated in *The Federalist* No. 84:

> [T]he practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone . . . are well worthy of recital: "To bereave a man of life, [says he] or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore A MORE DANGEROUS ENGINE of arbitrary government." And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the habeas-corpus act, which in one place he calls "the BULWARK of the British Constitution."

war, requiring that impartial hearings be held to determine their status if there is any doubt. Thousands of such hearings have been held in the wars we have waged in recent times, from Viet Nam to Iraq. So far as petitioners can determine, this is the first time the government has refused to abide by its regulations and provide these fundamental safeguards.

(b) The Decision Extends *Eisentrager* Beyond Its Holding or Proper Reach.

This is also the first time the courts have held that people jailed by the United States with no process whatsoever cannot even petition the courts to consider their claims. The D.C. Circuit based that holding almost exclusively on its reading of *Johnson v. Eisentrager*. But the facts of *Eisentrager* are fundamentally different. The Court in *Eisentrager* did not hold that aliens – or even the enemy aliens involved there – could be held indefinitely by U.S. officials without charge, right to counsel or access to an impartial tribunal. To the contrary, the petitioners in that case were tried by a military tribunal and found guilty after receiving those rights.

In *Eisentrager*, 27 German nationals were taken into custody after the end of World War II, formally accused of violating the laws of war, fully informed of the particulars of the charges against them, represented by counsel, and tried before a duly constituted military commission. *See* 339 U.S. at 766, 786. *Six were acquitted* and 21 convicted. *Id.* at 766. The sentences of those convicted were reviewed by a reviewing authority and upheld. *Id.*

One of those convicted petitioned for writs of habeas corpus on behalf of himself and the others. The petitioners did not allege their innocence or allege that they had been denied basic procedural rights. Instead, they alleged that the military commission had no jurisdiction to try them. *See Eisentrager v. Forrestal,* 174 F.2d 961, 963 (D.C. Cir. 1949).

The Supreme Court, in an opinion by Justice Jackson, rejected that contention, stating:

> We hold that the Constitution does not confer a right of personal security or immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States. . . .

339 U.S. at 785. The Court went on to state, *id.* at 786:

> [T]he Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war. . . . The petition shows that these prisoners were formally accused of violating the laws of war and fully informed of particulars of these charges. . . . "[I]f the Military Tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review. . . ."

In reaching that decision, the Court contrasted the litigation rights of citizens and aliens in U.S. courts. It found that, although citizens and resident alien friends enjoy similar civil and property rights, American law had traditionally treated resident *enemy* aliens differently. *Id.* at 768. For example, under the Alien Enemy Act of 1798, a *resident enemy* alien is subject to summary arrest, internment and deportation whenever a declared war exists between his or her native country and the United States, and if placed in custody, is entitled to judicial review only to ascertain whether a state of war exists and whether he or she is an enemy. *Id.* at 773-75. The Court concluded that, unlike a resident enemy alien, the *non-resident enemy* alien, "especially one who has remained in the service of the enemy, does not have [even] this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy." *Id.* at 776. Given this background, the Court declined to extend to the *convicted non-resident enemy aliens* in that case, who "at no relevant time were within any territory over which the United States is sovereign," the use of the habeas corpus process to

challenge in a civilian court their conviction by a duly constituted military tribunal.[13] *Id.* at 779.

In sum, the decision in *Eisentrager* was that non-resident *enemy* aliens, who had been duly represented by counsel and charged, tried, convicted, sentenced and imprisoned after appeal, had no right to challenge their conviction by a military commission in the civil courts through a post-conviction writ of habeas corpus. The D.C. Circuit held, in contrast, that no alien – enemy or friendly – located outside the sovereign territory of the United States may ever petition the U.S. courts for relief from detention without trial or charge, even when denied the most basic procedural due process protections.

Not only is this very far from the Court's holding in *Eisentrager*, it cannot plausibly be supposed to capture the intention of Justice Jackson's majority opinion. Justice Jackson made clear several years later in his dissent in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 209, 218 (1953), that he believed aliens incarcerated by the United States outside the United States are entitled to basic procedural due process protections.

Shaughnessy involved a habeas petition filed by an alien who had been excluded from entry into the United States and then found himself "stranded in his temporary haven on Ellis Island because other countries [would] not take him back." *Id.* at 207. The alien had been excluded by order of the Attorney General under authority expressly granted by Congress to prevent aliens from entering the country without a hearing based on confidential information. *Id.* at 208. The issue before the Court was whether

[13] Nevertheless, the Court emphasized that "the doors of our courts have not been summarily closed upon these prisoners." 339 U.S. at 780. Thus, the Court devoted the final six pages of its opinion to a careful examination of the prisoners' claims and found that their trial by military tribunal, as well as the denial of the right to file a writ challenging their convictions, was fully consistent with both the Constitution and international law. *Id.* at 785-91.

the exclusion "without a hearing amounts to an unlawful detention, so that courts may admit him temporarily to the United States. . . . " *Id.* at 207. The Court held that it did not. The majority emphasized that the power to exclude aliens from entering the country is "a fundamental sovereign attribute . . . largely immune from judicial control." *Id.* at 210. It found nothing in the case transforming it "into something other than an exclusion proceeding." *Id.* at 213.[14] Finding that the petitioner in that case was not being unlawfully detained, but simply excluded from the United States, the Court denied relief.[15]

Justice Jackson, in a dissent joined by Justice Frankfurter, disagreed. He found that the petitioner, confined on Ellis Island with no other place to go, must be regarded as deprived of his liberty and was thus entitled to procedural due process, even if outside the United States:

> Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial. Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of

[14] The Court pointed out that "harborage at Ellis Island is not an entry into the United States." 345 U.S. at 213.

[15] The majority did not hold that the alien petitioner in that case was without due process rights. Rather, it found that, with respect to an alien denied initial entry into the United States, "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 212. The majority thus recognized that what process is due an individual depends on the circumstances. For example, the process due individuals captured in the heat of, and held in the immediate aftermath of, battle is clearly different from the process due individuals a year and a half later, thousands of miles from any battlefield, in a place not subject to the exigencies of war and with no end in sight.

> habeas corpus largely to preserve these immunities from executive restraint. Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates.

Id. at 218-19. Justice Jackson carefully distinguished between substantive and procedural due process, concluding that:

> . . . the detention of an alien would not be inconsistent with substantive due process, provided . . . he is accorded procedural due process of law. . . .
>
> Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. . . . Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the government, as they should in matters of policy which comprise substantive law.
>
> . . . . Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. . . . Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to appear on ex parte consideration. . . .
>
> Our law may, and rightly does, place more restrictions on the alien than on the citizen. But basic fairness in hearing procedures does not vary with the status of the accused. . . . If they would be unfair to citizens, we cannot defend the fairness of them when applied to the more helpless and handicapped alien.

> . . . . [T]he Nazi regime in Germany installed a system of "protective custody" by which the arrested could claim no judicial or other hearing process, and as a result the concentration camps were populated with victims of summary executive detention for secret reasons. . . . There are other differences, to be sure, between authoritarian procedure and common law, but the differences in the process of administration make all the difference between a rein of terror and one of law. . . . Such a practice, once established with the best of intentions, will drift into oppression of the disadvantaged in this country as surely as it has elsewhere. . . .
>
> The Communist . . . [threat] poses a problem which sorely tempts the Government to resort to confinement of suspects on secret information secretly judged. I have not been one to discount the Communist evil. But my apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else.
>
> Congress has ample authority to determine who we will admit to our shores. . . . The only limitation is that it may not do so by authorizing United States officers to take without due process of law the life, the liberty or the property of an alien who has come within our jurisdiction; and that means he must meet a fair hearing with fair notice of the charges.
>
> It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone.

Id. at 224-27. Given those statements, could the D.C. Circuit be correct that Justice Jackson intended in *Eisentrager* to preclude judicial review and basic procedural due process protections to aliens "whose keep, in legal theory, is just outside our gates"? *See id.* at 219.

5. The Decision Wrongly Makes Judicial Jurisdiction, and the Government's Obligation to Obey the Law, Turn On Technical Sovereignty.

This case does not raise the question what rights an alien is due outside U.S. jurisdiction. These petitioners are within U.S. jurisdiction; they are being held in the exclusive custody of U.S. officials in an area wholly under U.S. jurisdiction and control.

There is also no doubt that they are subject to *exclusive* U.S. jurisdiction. The government made sure of that, by transporting them thousands of miles from Pakistan and Afghanistan, to whose courts they might otherwise have made claim, to Guantanamo, where no other courts could possibly intervene. It is the United States, and only the United States, that has jurisdiction over them. And it is the U.S. courts alone to which they can appeal.

The government has never disputed that the United States exercises effective sovereignty over Guantanamo. It exercises "the essential elements of sovereignty over this territory."[16] It is the "supreme authority" there.[17] As the United States Navy has said, Guantanamo, "for all practical purposes, is American territory."[18]

One would expect American laws to apply there, and they do. U.S. civil and criminal laws govern U.S. citizens and non-citizens alike in Guantanamo. A Cuban national wandering onto the base and violating the law would be subject to prosecution and trial on the U.S. mainland.[19] Even animals on Guantanamo are protected by U.S. laws and regulations; anyone, including any federal official,

[16] *See* U.S. Navy Website, n.6, *supra*.

[17] *See* Webster's 9th New Collegiate Dictionary 1128-29 (1988); Blacks Law Dictionary 1568 (4th ed. 1951).

[18] *See* U.S. Navy Website, n.6, *supra*.

[19] *See* n.5, *supra*.

who violates those laws is subject to civil and criminal penalties.[20]

Under the D.C. Circuit decision, however, human beings held prisoner at Guantanamo are not entitled to the same protection as a Cuban iguana: federal officials are free to violate federal laws and regulations with respect to those prisoners, and the courts have no jurisdiction to inquire into the legality of the officials' behavior or the humanity of the prisoners' treatment. The reason: Guantanamo is outside the area of technical U.S. sovereignty. Without technical sovereignty, according to the D.C. Circuit, there can be no judicial review.

Why should that be? Judicial review provides the most fundamental check on the power of the executive arbitrarily to deprive innocent persons of their liberty. It should be coextensive with that power and the danger of the power's susceptibility to abuse. Why should the executive be able to insulate itself from judicial review – and be free to hold innocent people arbitrarily and without justification – simply by resorting to the gimmick of transporting them to a site wholly within U.S. control but technically outside the area of U.S. sovereignty?

Making the government's legal obligations and the courts' jurisdiction terminate at a formal boundary defined by "sovereignty" – something that can be assigned in a property agreement regardless of actual dominion and control over a territory – would encourage manipulation of the legal process. The government could strip the courts of jurisdiction simply by negotiating leases for enclaves abroad in which it gives up meaningless technical sovereignty while acquiring supreme and actual control. The D.C. Circuit decision enables the government to establish penal colonies for foreigners outside the United States that are totally outside the law.

[20] *See* 16 U.S.C. § 1531 *et seq.*; 48 Fed. Reg. 28460-28464 (June 22, 1983).

6. The D.C. Circuit's Decision is in Conflict With Decisions of Other Circuits.

As the D.C. Circuit acknowledged, the Second Circuit had come to a contrary decision regarding the rights of aliens at Guantanamo. In *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326, 1341-45 (2d Cir. 1992), *vacated as moot*, 509 U.S. 918 (1993),[21] the Second Circuit held that Haitians interdicted by the United States on the high seas and transported to and detained at Guantanamo had a right not to be returned to Haiti without a fair adjudication as to whether they were *bona fide* asylees.

The Second Circuit expressly distinguished *Eisentrager*, pointing out that *Eisentrager*, "which involved convicted, enemy aliens in occupied territories outside the United States," does not resolve the question of whether "the fifth amendment applies to non-accused, non-hostile aliens held *incommunicado* on a military base within the *exclusive* control of the United States, namely Guantanamo Bay." 969 F.2d at 1343. (Emphasis added). The Second Circuit added: "It does not appear to us to be incongruous or overreaching to conclude that the United States Constitution limits the conduct of United States personnel with respect to officially authorized interactions with aliens brought to and detained by such personnel on a land mass exclusively controlled by the United States,"

[21] After the Second Circuit issued its decision, and the United States petitioned for certiorari, the Supreme Court vacated the decision as moot under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993). However, judicial opinions that are vacated under a *Munsingwear* order continue to have "'persuasive authority.'" *Kurtz v. Baker*, 644 F. Supp. 613, 621 (D.D.C. 1986) (quoting from *County of Los Angeles v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting)). *Accord, Edwards v. Madigan*, 281 F.2d 73, 78 n.3 (9th Cir. 1960). Indeed, the Second Circuit's views about the Guantanamo Bay Naval Base continue to be cited with approval. *See United States v. Corey*, 232 F.3d 1166, 1172 (9th Cir. 2000). *Cf. United States v. Gatlin*, 216 F.3d 207, 214 n.8 (2d Cir. 2000).

especially "given the undisputed applicability of federal criminal laws to incidents that occur there and the apparent familiarity of the governmental personnel at the base with the guarantees of due process, fundamental fairness and humane treatment that this country purports to afford to all persons." *Id.*[22]

Courts in other circuits have also held that foreign nationals in territories over which the United States exercises *de facto* control, but lacks technical sovereignty, have access to the U.S. courts. *See Government of the Canal Zone v. Scott*, 502 F.2d 566, 568-69 (5th Cir. 1974) (Canal Zone); *Juda v. United States*, 6 Cl. Ct. 441, 458 (1984) (Marshall Islands); *United States v. Tiede*, 86 F.R.D. 227, 242, 244 (Ct. Berlin 1979) (West Berlin).

7. The D.C. Circuit's Decision Places U.S. Law in Conflict with the Law of Other Civilized Nations.

Courts in other nations have firmly rejected the contention, adopted by the D.C. Circuit here, that governments may insulate themselves from court review and from the obligation to provide basic procedural protections, by detaining individuals outside their sovereign territory.

That contention has been squarely rejected by the courts of England. As the English Court of Appeal recently stated in a case brought by one of the Guantanamo detainees:

[22] *See Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1041-43 (E.D.N.Y. 1993):

> These Haitians are at a military base solely because defendants chose to take them there.... If the Due Process Clause does not apply to the detainees at Guantanamo, Defendants would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin.

> The United Kingdom and the United States share a great legal tradition, founded in the English common law. One of the cornerstones of that tradition is the ancient writ of habeas corpus, recognized at least by the time of Edward I, and developed by the 17th Century into "the most efficient protection yet developed for the liberty of the subject. . . . "
>
> This principle applies to every person, British citizen or not, who finds himself within the jurisdiction of the court: "He who is subject to English law is entitled to its protection." . . . It applies in war as in peace; in Lord Atkin's words (written in one of the darkest periods of the last war):
>
> > "In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace."

Abbasi v. Secretary of State for Foreign and Commonwealth Affairs, EWCA CIZ. 1598 (2002), 2003 U.K.H.R.R. 76. *See also Ex parte Menwa*, 1 QB 241 (1960) (a writ may issue in Northern Rhodesia, a "foreign country within which Her Majesty has power and jurisdiction by treaty" because the writ may issue to any place under the "subjection" of the Crown); *R. v. Secretary of State for the Home Department ex parte Khawaja*, AC 74 (1984); *R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*, QB 1067 (2001); *Rex v. Cowle*, 2 Burr 834 (1759) (Mansfield, C.J.).

Judicial review of executive detention has also become a fundamental requirement of international law. For example, the International Covenant of Civil and Political Rights ("ICCPR"), to which the United States is a party, expressly provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that a court may decide without delay on the lawfulness of his detention. . . .

ICCPR, Art. 9, § 4. (App. 86).[23] International courts and commissions have uniformly held that states must provide these guarantees to all individuals subject to their jurisdiction and control, even if those individuals are outside their territory. *See, e.g., Sergio Euben Lopez Burgos v. Uruguay*, U.N. Doc. Supp. No. 40 (A/36/40) (June 6, 1979) ("It would be unconscionable . . . to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its territory."); *Ocalan v. Government of Turkey*, Eur. Ct. H.R. (Mar. 2003) (a leader of the Kurdish resistance in Kenya "was under effective Turkish authority and therefore was brought within the 'jurisdiction' of that state for purposes of" the European Convention of Human Rights); *Cyprus v. Turkey*, 4 Eur. H.R. Rep. 482 (1982) (states are "bound to secure the said rights and freedoms of all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad"); *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513 (1997) (a "state cannot insulate itself from Convention scrutiny by operating beyond state frontiers").

Does U.S. law depart so fundamentally from that of other civilized nations?

8. The Decision is Inconsistent with Other Decisions of This Court.

This Court has emphasized that a strong presumption exists that the courts have jurisdiction to review constitutional challenges to executive action, particularly when those actions deprive individuals of their liberty, and that this presumption may be overcome only by clear and

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[23] *See, e.g.*, American Declaration on the Rights and Duties of Man ("ADRDM"), Art. XXV, O.A.S. T.S., 11 U.N.T.X. 123 (1948); American Convention on Human Rights, Art. 7(5), O.A.S. T.S. No. 36, 1144 (1969); United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, May 2, 1948, OEA/Ser. L/V/I.4 Rev. (1988), 11(1). (App. 87-90).

unequivocal statutory preclusion of jurisdiction. *See, e.g., Demore v. Kim*, 123 S. Ct. 1708, 1714 (2003); *I.N.S. v. St. Cyr*, 533 U.S. 289, 298-99 (2001); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Davis v. Passman*, 442 U.S. 228, 241-42 (1979); *Territory of Guam v. Olsen*, 431 U.S. 195, 203-04 (1977). There has been no showing here of any preclusion – let alone clear and unequivocal preclusion – of jurisdiction.

This Court has also explicitly recognized that foreign nationals located outside U.S. sovereign territory are entitled to protection under the Fifth Amendment at least to the extent that they may not be subjected to personal jurisdiction by this country's courts "under circumstances that would offend 'traditional notions of fair play and substantial justice.'" *See Asahi Metal Industry Co. v. Superior Ct. of California*, 480 U.S. 102, 113 (1987). Are foreign nationals who have been subjected to physical confinement by this country's government not entitled to be treated in accordance with the same "traditional notions of fair play and substantial justice"?

9. The Decision Grants the Government Unprecedented Authority Over Citizens of Allied Nations.

According to the D.C. Circuit, there is no relevant distinction between citizens of enemy and friendly nations; they may be treated the same, so long as they are held in custody outside the zone of U.S. sovereignty. That is an unprecedented ruling, exposing citizens of our allies to summary capture, deportation and detention, all without charge, hearing or judicial protection.

The D.C. Circuit based that ruling on its reading of *Eisentrager*. But the petitioners in *Eisentrager* were all alien enemies – citizens of a hostile nation at war with the United States – a fact emphasized throughout the opinion. As Justice Jackson pointed out, the restrictions imposed upon the enemy alien arise because "his nation takes up

arms against us." 339 U.S. at 771. Justice Jackson emphasized the point again in his dissent in *Shaughnessy*: "The alien enemy may be confined . . . because hostility is *assumed* from his continued allegiance to a hostile state." 345 U.S. at 223 (emphasis added). No such assumption can be made with respect to the Kuwaiti Detainees who are citizens of a friendly state.

Clearly, in the war on terrorism, our enemies do not always wear uniforms, and they may be citizens of hostile states or of our closest friends. Unlike a citizen of an enemy nation, however, one cannot assume enmity on the part of a citizen of a friendly nation. Justice Jackson pointed out in *Eisentrager* that even enemy aliens, if resident in the United States, are entitled to a hearing to determine if they are in fact enemies, because one cannot be certain of their allegiance. 339 U.S. at 778. Should presumably friendly aliens not be entitled to that much?

It may be that U.S. government officials are free outside our sovereign territory to treat citizens of other nations, friend and foe, without regard to our "traditional notions of fair play and substantial justice." *See Asahi*, 480 U.S. at 113. That was clearly not Justice Jackson's view. In any event, if that is to be so, it should be decided squarely by this Court and not simply assumed from dicta in other cases decided in other circumstances on the basis of other facts.

CONCLUSION

This case raises questions that test the character of our nation and our standing in the world community. We are a nation, unlike others, bound together not by race or creed, but by principles. Chief among those are democracy, individual liberty and the rule of law. These are our birthright, and also our responsibility. They are our most powerful symbols abroad and a major source of our respect and strength among the community of nations. Court review is essential both to preserve those principles and to assure our friends around the world that these principles

will not be abandoned without at least review by the highest Court in the land.

Petitioners respectfully request that this Court grant *certiorari*.

Respectfully submitted,

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